



REPUBLIC OF KENYA



KENYA LAW
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**Kaloki v Mutua & another (Civil Appeal E004 of 2021)
[2022] KEHC 231 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E004 OF 2021
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

THOMAS ITUTE KALOKI APPELLANT

AND

FREDRICK MUGO MUTUA 1ST RESPONDENT

BENJO (K) LIMITED 2ND RESPONDENT

(Being an appeal from the entire judgment and decree of Hon. G. O. Shikwe (Mr) (SRM) in Kithimani Senior Resident Magistrate's Court Civil Case No. 91 of 2019 delivered and dated 13th January 2021)

JUDGMENT

BACKGROUND:

1. The Plaintiff filed Amended Plaint dated 2nd October, 2019 on 8th October, 2019. The Plaintiff/Appellant herein deposed that on 15th April, 2019, he was a lawful pedestrian along Matuu – Thika Road at Kithimani Trading Center, when motor vehicle registration number KCP 961F driven by the 1st defendant being the driver/agent/servant and/or employee of the 2nd Defendant, or the beneficial owner of the said motor vehicle so negligently, managed, controlled and/or drove the said motor vehicle, lost control and knocked down the plaintiff as a result of which the plaintiff sustained serious injuries, loss and damage.
2. As a result of the accident the Plaintiff/Respondent sustained serious injuries and was taken to Matuu Level 4 Hospital where it was discovered that he had sustained brain injuries, fracture at back of this right ear, back bone and affected his eye sight. He was transferred to Machakos Level 5 hospital where he was admitted and later referred to Kenyatta National Hospital for further treatment. He further stated that he is still going for checkups. He blamed the driver of the motor vehicle registration number KCP 961 F for driving at a high speed which resulted to the said accident.



3. The Plaintiff incurred expenses and special damages as a result of his injuries amounting to Kshs.13,050/-. He prayed for the general damages for pain and loss of amenities, special damages as pleaded and costs and interest.

DEFENCE

4. The Defendants filed their statement of defence dated 15th day of August, 2019. They denied all the allegations by the Plaintiff in totality and put the plaintiff to strict proof thereof and stated that if any accident occurred at the place and date alleged (which is denied), the same was wholly caused by or substantially contributed to by the negligence of the Plaintiff.

EVIDENCE

5. The Plaintiff called one (1) witness in support of his case.
6. PW.1 Thomas Itute Kaloki (The Plaintiff) asked the court to adopt his witness statement dated 11/10/2019. He further said that he was injured on his head and brain, right side and his back and shoulder and eye and that he was yet to heal. He was attending hospital as an outpatient at Kenyatta National Hospital. He produced documents in support of his evidence.
7. The defence did not call any witness.

JUDGMENT OF THE TRIAL COURT

8. The Trial Court in its judgment delivered on 13th January, 2021 the court entered judgement for the plaintiff against the defendant as follows: Liability assessed at 100% against defendants jointly and severally General damages awarded Kshs.400,000/- Special damages Kshs.36,895/- Total Award kshs.436,895/- The Plaintiff will also have the costs of the suit with interest thereon.

APPEAL

9. Aggrieved by the Trial Court judgment, the Appellant herein filed his Memorandum of Appeal dated 19th day of January, 2021 on 25th January, 2021 based on the following grounds:-
 - (a) That the Trial Magistrate erred in awarding an inordinately low sum for the injuries suffered in the face of the evidence adduced and submissions made by the appellant's counsel on quantum.
 - (b) That the Trial Magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and facts.
 - (c) The Learned Magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly low as to be erroneous.
 - (d) The Learned Magistrate erred in assessing an award, hereunder, which was inordinately low and wholly erroneous estimate of the loss and damages suffered by the Appellant: general damages of Kshs.400,000/- and special damages of kshs,36,895/-.
 - (e) The learned trial magistrate erred in law and fact by failing to apply the doctrine of stare decisis when assessing the damages awarded to the appellant.
10. The Appellant sought the following orders:
 - (a) Spent....



- (b) That the judgment and Decree of Honourable G. O. Shikwe (Mr.) SRM dated 13th January, 2021 be set aside and be substituted with an award on quantum as proposed in the Appellant's submissions dated 8th October 2020. That the Court re-assesses the General damages awarded.
- (c) Costs of this appeal be awarded to the Appellant.

APPELLANT SUBMISSIONS DATED 19TH OCTOBER, 2021

11. The Appellant submitted that amount awarded at the Trial Court is inordinately low and further the Trial Court did not consider the Appellant's submission on quantum. Reference was made in the Case of *Kemro Africa Limited t/a "Meru Express Services" & Another -vs- Lubia & Another [1985] eKLR* and *Olive Ibia (1982 – 88) 1KAR 727* and restated by the Court of Appeal in the case of *Arrow Car Limited -Vs- Elijah Sahmalla Bimomo and 2 Others [2004] eKLR* as follows:-

“the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Trial Judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

12. The Appellant further submitted that the injuries he sustained were severe brain injury, fracture at the back of his right ear, backbone and loss of sight and he is yet to heal and complained of forgetfulness, lack of coordination, complete loss of hearing on his right ear, pain on his head, back and legs among other difficulties. He had proposed Kshs. 5,000,000/- for general damages and special damages of Kshs.44,395/-. He cited the several cases where the Plaintiff sustained similar injuries:-

- (a) *Susan Wanjiru Njuguna -vs- Keringet Flowers limited & 2 others Nakuru HCCC no 64 of 2001* where the plaintiff sustained severe head injuries and the Court on 3rd July, 2008 awarded Kshs. 3,000,000/- for damages for pain and suffering and loss of amenities.
- (b) *Jane Elsa Oyoo -vs- Oyoo -vs- Lochab Brothers Nairobi HCCC No. 5733 of 1991* where the Plaintiff suffered a depressed compound fracture of the left frontal bone with pneupmocephalans, fracture of the left and right orbits and fracture of the maxillary bones. She was found to have a complete loss of sight in both eyes. The eye specialists recommended that she be given 100% compensation for the total loss of sight. She was conscious after the accident for a period of seven days and suffered posttraumatic epilepsy of about 20% for about 2 years. The epilepsy was later controlled with drugs and the surgeon certified that there was no more risk of epilepsy. The plaintiff's total physical invalidity was assessed at 90-95%. The plaintiff was unable to do any manual work. The Court awarded total damages of Kshs. 3,340,000/- were awarded.
- (c) *A.A.M -vs- Justus Gisairo Ndarera & Another [2010]2KLR* damages of Kshs. 2.5 million were to the Plaintiff who had suffered a fracture of the left temporal lobe, intra cerebral hemorrhage, diffused brain edema, paralysis of the right hand especially the forearm and fingers and shortening of the right leg.
- (d) *Grace wanjiru Mbaga -vs- Mission to Seamen and Mohamed Yusuf HCCC 4 of 1992 - Mombasa* – The brain injuries suffered by the plaintiff was such that the plaintiff will never be employed for the rest of her life. She was awarded general damages of Kshs.2,000,000/-.
- (e) *James Katua Peter -vs- Simon Mutua Muasya HCCC No. 135 of 2001 Machakos* – The Plaintiff suffered bodily injuries including head injuries. He was awarded Kshs.2,000,000/- for



pain and suffering, and Kshs. 5,000,000/- and cost of future operation arising from the injuries suffered.

- (f) *John Maseno Ngala & General Motors Ltd –vs- Dan Nyamamba Omare a minor suing thro’ Isaac James Omare (next friend- Nakuru HCCC No. 320 of 2002 – Damages of Kshs.2,001,000/- were awarded by the High Court sitting at Nakuru for head injuries.*
- (g) *Eldoret HCCC No. 118 of 1996 – Prisca Cherono Kiticheruiyot –vs- Kiara & Kipkenenei Songok – The Plaintiff in that case had suffered Fractured skull (in ICU for 6 days), severe primary brain injury with left extradural haematoma, spastic paralysis of left arm and left leg, slurred speech and poor memory, Temperamental and Weakness of right arm. The Court made an award of Kshs.1.7 million in general damages.*
13. The Appellant stated that the comparable injuries should as far as possible be compensated by comparable award and submitted that the sum awarded as general damages of Kshs.400,000/- is so inordinately low taking into consideration comparable authorities submitted.
14. It was submitted that the Trial Court misdirected itself when it downplayed the Appellants injuries that affected his normal brain functions.
15. Further it was submitted that this is a suitable case for the Court to exercise its discretion and interfere with the Trial Court’s findings on general damages for the reasons that general damages for pain and suffering and loss of amenities awarded were so manifestly low so as to warrant such interference and pray that the court sets aside the award of Kshs.400,000/- and substitute it with an award of Kshs.5,000,000/- with costs of the suit in the lower court and costs of this humble appeal.

RESPONDENT SUBMISSIONS DATED 1ST OCTOBER 2021

16. The Respondent submitted that the Appellant relied on irrelevant precedents in making its submissions in the lower court by citing matters that harboured much more grievous injuries than the ones he suffered and urged this Court to uphold the award given by the lower Court and relied on the following authority – in case of *Duncan Mwenda and & 2 others –vs- Sila Kinyua Kithela [2018] eKLR* the respondent who sustained sever blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall the Court of Appeal awarded Kshs. 350,000/- as general damages. Also the case of *Densire Muteti Wambua –Vs Kenya Power & Lighting Co. Limited [2013] eKLR*.
17. The Respondent concluded by urging this Court to uphold the judgment of the Trial Court herein, dismiss the Appeal and award them the costs of this Appeal.

DETERMINATION

18. I have considered the submissions filed and case-law by respective parties. The issue for determination is the assessment of general damages afresh as the Trial Court awarded an inordinately low figure taking into the injuries inflicted on the Plaintiff/Appellant.
19. This being a first appellate court, whose role is well captured in the case of *Selle vs. Associated Motor Boat Co [1986] EA 123* as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect



in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

QUANTUM

20. The Appellant urged this court to re-assess the general damages for being inordinately low for injuries sustained from the accident and in light of the conventional awards in relation to such injuries.
21. The Appellant submitted that the general damages ought to be in the range of Ksh 5,000,000/- considering the injuries sustained and treatment. The Plaintiff deposed that he sustained fairly serious injuries that included brain oedema, displaced fracture of the right mastoid bone. The head injuries were managed conservatively and was put on anti-menengitic drugs and analgesics and was discharged. According to Dr Kioko, the Appellant's Complaints included on and off headaches which are managed with available oral analgesics.
22. The Report by Dr. Muli Simeon Kioko of 14/5/2019 disclosed plaintiff's injuries as; multiple small hemorrhagic contusions, and hemorrhage in cerebral hemispheres bilaterally, subdural haematoma, non-displaced fracture in the right mastoid bone extending to the sphenoid bone scalp skin tenderness.
23. The Plaintiff sought treatment from Matuu Hospital, Machakos Level 5 Hospital and Kenyatta Hospital. He is yet to heal and complained of forgetfulness, lack of coordination, complete loss of hearing in the right ear, pain in the head, back and legs.
24. The Respondent submitted that the Doctor's Report of 14th May 2019 by Dr. Kioko, the Doctor did not refer to any abnormality noted in the Plaintiff's brain as per the German Medical Centre Report of 15/4/2019 which involved taking of CT scan of the brain.
25. The Respondent referred to the Report by Dr Kioko and no permanent disability, blindness or hearing loss was detected.
26. The Report referred to by Dr. Jennifer Kahuthu did not refer to any permanent disability
27. The Appellant contested the production of the medical Report by Dr. Jennifer Kahuthu.
28. This Court considered the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* where the Learned judges set out the parameters under which an appellate court will interfere with an award for general damages and held that: -

"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."

29. The general damages awarded by the Trial Court was/is Ksh 400,000/- and in light of the injuries sustained by the Plaintiff and the medical report there is no evidence of incapacity or permanent disability. Secondly, the Trial Magistrate claimed that the authorities cited by the Plaintiff in the written submissions were of higher damages based on extensive injuries and permanent brain damage which was not the case in the instant case. The Court confirmed the said authorities were of more serious injuries as found by the Trial Court.



30. According to the *Black's Law Dictionary* Free Online Legal Dictionary 2nd Edn.-
“General damages are the damages and injuries that directly result from an action or the failure to take action of the defendant.”
31. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:-
“...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty...”
32. In *Mcgregor on damages* 15th Edition 1988 paragraph 153, its observed as follows:
“pain and suffering is now almost a term of art. In so far as that can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. It thus includes the pain caused by any medical treatment which the plaintiff, might have to undergo. Suffering on the other hand denotes the mental or evidential distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like, it is not however, usual for Judges to distinguish between the two elements?
Whereas loss of amenity is deprivation of the plaintiff of the capacity to do the things which before the accident he was able to enjoy, and due to the injury he is fully or partially prevented from participating in the normal activities of life.”
33. The Plaintiff sought treatment from Matuu Hospital, Machakos Level 5 Hospital and Kenyatta Hospital. He is yet to heal and complained of forgetfulness, lack of coordination, complete loss of hearing in the right ear, pain in the head, back and legs and continues to obtain medical treatment.
34. In assessing damages the general principle is that comparable injuries should as far as possible attract comparable awards as the Court of Appeal stated in *Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998* [1998] eKLR that:
“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.” See *Kigaraari vs. Aya* (1982-88) 1 KAR 768.
35. The Court considered the fact that the P3 form of 2/5/2019 confirms extensive injuries on the head and neck arising from the accident and degree of harm is grievous harm. Secondly, the Plaintiff presented a bundle of receipts that depict CT scan of 15/4/2019 that disclosed the injuries highlighted by the doctor's Report, laboratory tests and purchase of medicine over the long span of time.
36. The extent and future treatment is not conclusive in the absence of the testimony of the Doctor(s) save for presenting medical reports and the evidence presented by both parties' remains compelling but parallel and diverse positions taken by the parties'.
37. In the circumstances, The Trial Court considered the evidence, doctors reports and the authorities and this Court finds no wrong principles were employed or any misapprehension of the evidence in some material respect.



38. There is also lack of cogent and tangible evidence of permanent disability or incapacity and/or prolonged treatment and medical care to inform increase of award of general damages.

DISPOSITION

1. The Appeal is dismissed, Judgment of 13/1/2021 upheld.
2. Each Party to bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022. (VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

